

Hutchinson v Saks & Co.
2018 NY Slip Op 32481(U)
October 2, 2018
Supreme Court, New York County
Docket Number: 159599/2014
Judge: Kelly A. O'Neill Levy
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KELLY O'NEILL LEVY

JSC

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19**

-----X

YVONNE HUTCHINSON,

Plaintiff,

- v -

SAKS & COMPANY, SAKS FIFTH AVENUE, INC, CREATIVE
INSTALLATIONS, INC., SECURITAS HOLDINGS, INC., and
SECURITAS SECURITY SERVICES, USA, INC.,

Defendants.

INDEX NO. 159599/2014

MOTION DATE 08/20/2018

MOTION SEQ. NO. 003, 004

DECISION AND ORDER

-----X

SAKS & COMPANY and SAKS FIFTH AVENUE, INC,

Third-Party Plaintiffs,

- v -

CREATIVE INSTALLATIONS, INC., SECURITAS HOLDINGS,
INC., and SECURITAS SECURITY SERVICES, USA, INC.,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 98, 101, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130, 131, 132, 145, 146

were read on this motion to/for Summary Judgment

The following e-filed documents, listed by NYSCEF document number (Motion 004) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 99, 100, 102, 128, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for Summary Judgment

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is a personal injury action arising from a trip and fall accident. Defendants/Third-Party Plaintiffs Saks & Company and Saks Fifth Avenue, Inc. (collectively, hereinafter, Saks) move (mot. seq. 003) for an order: (1) pursuant to CPLR § 3212, granting summary judgment in

their favor and dismissing all claims against them with prejudice, (2) granting Saks' common law indemnity cross-claims and third-party claims against defendant/third-party defendant Creative Installations, Inc. (hereinafter, Creative) and defendants/third-party defendants Securitas Holdings, Inc. and Securitas Security Services, USA, Inc. (collectively, hereinafter, Securitas), and (3) granting Saks' defense and contractual indemnity cross-claim and third-party claim against Securitas. Securitas, Creative, and plaintiff Yvonne Hutchinson oppose.

Creative moves (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing all cross-claims against it. Saks, Securitas, and plaintiff oppose.

BACKGROUND

On the evening of August 11, 2014, plaintiff Yvonne Hutchinson, along with her sister and niece, were shopping at the Saks Fifth Avenue store located at 611 5th Avenue in Manhattan (hereinafter, the store). They finished shopping at around 9:00 p.m., at which point the store was closed to the public.¹ Plaintiff testified that a sales associate escorted her party to the elevator, which they took to the main floor to exit the store [Plaintiff tr. (ex. F to the Grimes aff.) at 19-20].

Upon exiting the elevator, a security guard employed by Securitas approached and directed them to the door to the right direction from the elevator (hereinafter, the post-2 door) (*id.* at 20). They walked over Masonite boards that were placed continuously between the elevator and the post-2 door (*id.* at 26-27). Creative placed the Masonite boards on the floor so

¹ Deposition testimony differs as to exactly what time the store closed on August 11, 2014, but there is no dispute that the store closed prior to 9:00 p.m., before plaintiff's accident. Mr. Mastoros, an Asset Protection Manager for Saks, and Mr. Raspanti, a foreman for Creative, testified that the store closed at 8:00 p.m. (Mastoros tr. at 17; Raspanti tr. at 15), Mr. Grant, an Asset Protection Manager for Saks, testified that the store closed at 8:30 p.m. (Grant tr. at 14), and Mr. O'Brien, a branch manager for Securitas, testified that the store closed at around 8:45 p.m. (O'Brien tr. at 15-16).

that it could bring construction materials into the store [Deposition of Michael Raspanti, Foreman for Creative (ex. C to the Kogan aff.) at 25]. As plaintiff and her companions approached the post-2 door, the Securitas guard held the door open [Surveillance Video (ex. 1 to the Handler aff.)]. Plaintiff was the last person in her party to exit the store (*id.*). Plaintiff testified, and the surveillance video confirms, that as she was exiting the store, her left leg got caught in between two Masonite boards placed over the saddle in the doorway and she fell forward into the vestibule area (Plaintiff tr. at 29; Surveillance Video).

Saks did not hire or contract with Creative in connection with the work Creative performed on the evening of the accident (Raspanti tr. at 44-45). Creative was working on behalf of vendor Dolce & Gabbana (*id.*). Saks did not oversee, inspect, or direct Creative's work for Dolce & Gabbana (*id.*). Saks contracted with Securitas to provide security services for the store [Service Agreement (ex. 2 to the Handler aff.)].

Andy Mastoros, an Asset Protection Manager for Saks, testified that any customers that remained in the store after hours were to be directed to the employee entrance [Mastoros tr. (ex. B to the Kogan aff.) at 17-18]. He also testified that the post-2 door was not the same door as the employee entrance (*id.* at 20).

Michael Raspanti, a foreman for Creative, confirmed that Creative used the post-2 door to bring in materials and equipment (Raspanti tr. at 17-18, 22). He testified that when the store was closed, customers were to use the employee entrance, not the post-2 door (*id.* at 18-19, 38). He stated that Creative waited until all customers left the store before it got clearance from security to place the Masonite boards on the floor and bring construction materials into the store (*id.* at 23-24, 33). Once Creative placed the Masonite on the floor, it would inspect the floor to

make sure that the boards were flat and flush against each other (*id.* at 27). Creative would only tape the boards together if they were to be left on the floor for a day or two (*id.* at 29).

Jeffrey O'Brien, a branch manager for Securitas, testified that vendors entered the store from the employee entrance, but they used the loading dock to bring in heavy machinery and carts [Deposition of Jeffrey O'Brien (ex. D to the Kogan aff.) at 38-39]. He believed that if a construction crew was using the wrong entrance, it would be Securitas' responsibility to prevent them from coming in from that entrance (*id.* at 46).

Richard Grant, an Asset Protection Manager for Saks, testified that one Saks employee would remain in the store inside the camera room after closing [Deposition of Richard Grant (ex. E to the Kogan aff.) at 17-18]. He also testified that if customers remained in the store after closing, they would use the employee entrance to exit the store (*id.* at 19). He stated that beginning at 9:00 p.m., Saks would allow construction companies to enter the store, even if there were still customers inside the store (*id.* at 25-26). Those remaining customers would leave through the employee entrance and the incoming construction workers would either enter from the loading lock or the post-2 door (*id.* at 27).

Raphael Merejo, a Securitas security officer stationed at the store who witnessed the accident, testified that he had previously seen construction workers bring in material from the post-2 door, rather than the loading dock [Deposition of Raphael Merejo (ex. A to the Drago aff. in opp.) at 24]. He also testified that "everybody" used the post-2 door to leave the store after closing and that no one from Saks' asset protection department told him that customers were to use the employee entrance after closing (*id.* at 26-27, 64). He confirmed that on the date of the accident, Creative's workers did not tape the Masonite boards (*id.* at 32). He stated that on previous occasions the Masonite boards were taped to the floor (*id.* at 55).

DISCUSSION

Summary Judgment Motions on Liability

Saks and Creative both move, pursuant to CPLR § 3212, for summary judgment and dismissal of all respective claims and cross-claims.

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a *prima facie* showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Saks asserts that the Masonite boards on the floor were an open and obvious condition and were not inherently dangerous as a matter of law. Moreover, Saks argues that it did not create the condition or have actual or constructive notice of the condition because it did not place the Masonite on the floor, and no Saks employees were present in the area during the three minutes between the time when the boards were placed on the floor and the time of the accident.

Securitas asserts that both motions are premised on the misplaced allegation that a Securitas security officer directed plaintiff to exit the store through the wrong door. Securitas argues that there is a question of fact as to whether the post-2 door was, in fact, the wrong door

for customers to exit the store. Securitas also contends that there is a question of fact as to whether Creative was improperly bringing construction equipment through the post-2 door.

Creative asserts that it is entitled to summary judgment because an independent contractor should not be held directly liable to non-contracting third parties. Creative also argues that a property owner has a non-delegable duty to maintain its premises. Saks opposes, contending that Creative created the condition which caused plaintiff to trip. Creative offers a document titled "Saks Fifth Avenue NY Store Construction Requirements 2015," and presents it as an agreement between Saks and Creative regarding construction activities [Saks Fifth Avenue NY Store Construction Requirements 2015 (ex. B to the Drago aff.)]. However, the document is not signed, does not mention Creative by name, and appears to detail Saks' construction requirements for the year 2015, while the accident took place in 2014. Accordingly, it can not be considered.

Plaintiff asserts that there was confusion as to the proper procedure to be followed by construction workers and employees. She argues that witnesses testified differently as to who was responsible for escorting customers out of the store after hours. She contends that Saks did not properly clear the store before allowing workers inside, the Securitas guard escorted plaintiff to the accident location, and Creative failed to place the Masonite boards on the floor in a safe manner by neglecting to tape and properly align them.

There is conflicting testimony as to whether the post-2 door was the proper exit from which the Securitas guard was to direct plaintiff out of the store. Mr. Mastoros, Mr. Raspanti, and Mr. Grant testified that any customers remaining in the store after hours were to be directed to the employee entrance (Mastoros tr. at 17-18; Raspanti tr. at 17-18, 22; Grant tr. at 19). Yet,

Mr. Merejo testified that “everybody” used the post-2 entrance to leave the store after closing (Merejo tr. at 26-27).

There is also conflicting testimony regarding whether Creative was using the wrong door to bring equipment into the store. Mr. O’Brien testified that vendors would enter the store from the employee entrance, but then use the loading dock to bring in heavy machinery and carts (O’Brien tr. at 38-39), yet Creative used the post-2 door to bring carts into the store (Raspanti tr. at 17-18, 22). Mr. Merejo testified that he had previously seen construction workers bring material in from the post-2 door rather than the loading dock (Merejo tr. at 24). Mr. Grant testified that incoming construction workers would either enter from the loading dock or the post-2 door (Grant tr. at 27).

It is unclear whether Creative was required to wait until all customers exited the store before it brought in equipment. Mr. Raspanti testified that Creative waited until all customers left the store before they got a clearance from security to place the Masonite boards on the floor and bring construction materials into the store (Raspanti tr. at 23-24, 33). Mr. Grant testified that Saks would allow construction companies to enter the store, even if there were still customers inside the store (Grant tr. at 25-26). It is unknown whether Creative received clearance from Saks’ security to begin work prior to the accident.

Additionally, it is unclear, based on the testimony and the surveillance video, whether Creative was negligent in placing the Masonite boards on the floor and whether it was necessary to tape the boards to the floor. Mr. Raspanti testified that once the Masonite was placed on the floor, Creative would inspect it to make sure that the boards were flat and flush against each other, and that Creative would only tape the boards together if they were to be left on the floor for a day or two (Raspanti tr. at 27, 29). Mr. Merejo testified that on the evening of the accident,

Creative's workers did not tape the Masonite boards, but on previous occasions the Masonite boards were taped to the floor (Merejo tr. at 32, 55). Based on the surveillance video, it appears that there were two Masonite boards placed on the saddle in the post-2 doorway and when plaintiff tripped, one of the boards slid and became misaligned (Surveillance Video). It is unclear from the surveillance video whether the boards were aligned and flush against each other prior to the accident.

Also, it is unclear whether Saks was on notice of the dangerous condition and whether the condition of the Masonite boards was open and obvious, as Saks had an employee in the camera room at the time of the accident who might have seen that the post-2 door was being used to bring construction materials into the store, that customers were still inside the store, and that the Creative workers had placed the Masonite boards on the floor without taping them.

There are material issues of fact that preclude granting the summary judgment motions on liability. Accordingly, both Saks and Creative's motions for summary judgment on liability are denied.

Common Law Indemnity

Saks moves for an order granting summary judgment on its common law indemnity cross-claims and third-party claims against Creative and Securitas. Creative also moves for summary judgment on these claims against it.

To establish a claim for common-law indemnification, the proposed indemnitee must show that it is not guilty of negligence and that the proposed indemnitor(s) are guilty of some negligence that contributed to the cause of the accident. *See Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65 (1st Dep't 1999).

It is unclear here whether Creative or Securitas were negligent and vicariously liable for plaintiff's accident and whether Saks is free from any negligence, based on the numerous material issues of fact. Therefore, the respective motions are denied.

Contractual Indemnity

Saks moves for an order granting summary judgment on its defense contractual indemnification cross-claim and third-party claim against Securitas.

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.’” *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 (1987), quoting *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 (1973); see *Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 (2004); *Torres v. Morse Diesel Intl., Inc.*, 14 A.D.3d 401, 403 (1st Dep’t 2005). With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability; “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant.” *De La Rosa v. Philip Morris Mgt. Corp.*, 303 A.D.2d 190, 193 (1st Dept 2003) (citation omitted); *Keena v. Gucci Shops*, 300 A.D.2d 82, 82 (1st Dept 2002).

The relevant Service Agreement entered by Saks and Securitas states in pertinent part:

“SECURITAS agrees to defend (controlling such defense), Indemnify and hold Client [Saks] harmless from and against any claim, action, damage or liability arising from injury to or death of persons or damage to or destruction of property (collectively, “Claims”) to the extent such Claims are caused by the negligence of SECURITAS, its employees or agents while acting within the scope of their specified duties. SECURITAS shall not be liable for any claim of indemnification arising from the sole negligent act or malfeasance of the client, including but not limited to the violation of any federal, state or local laws by the Client.” [Service Agreement (ex. 2 to the Handler aff.) at Section III]

While the language of the Service Agreement clearly states that Securitas agrees to defend and indemnify Saks to the extent that the claim is caused by Securitas' negligence, it is unclear whether those duties are triggered here. It is presently unclear whether Securitas was negligent in this matter, as there are issues of fact as to whether plaintiff was properly directed to the post-2 door. It is also unclear whether Saks is free from all negligence related to plaintiff's accident. Thus, the court denies Saks' motion for an order granting summary judgment on its defense and contractual indemnification cross-claim and third-party claim against Securitas.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that the branch of defendants/third-party plaintiffs Saks & Company and Saks Fifth Avenue, Inc.'s motion (mot. seq. 003) for an order granting summary judgment in its favor and dismissing all claims against it is denied; and it is further

ORDERED, that the branch of defendants/third-party plaintiffs Saks & Company and Saks Fifth Avenue, Inc.'s motion (mot. seq. 003) for an order granting Saks' common law indemnity cross-claims and third-party claims against defendant/third-party defendant Creative Installations, Inc. and defendants/third-party defendants Securitas Holdings, Inc. and Securitas Security Services, USA, Inc. is denied; and it is further

ORDERED, that the branch of defendants/third-party plaintiffs Saks & Company and Saks Fifth Avenue, Inc.'s motion (mot. seq. 003) for an order granting Saks' contractual indemnity cross-claim and third-party claim against defendants/third-party defendants Securitas Holdings, Inc. and Securitas Security Services, USA, Inc. is denied; and it is further

ORDERED, that Creative Installations, Inc.'s motion (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing all cross-claims against it is denied.

This constitutes the decision and order of the court.

10/2/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY

JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE